In the United States Bankruptcy Court
for the
Southern District of Georgia
Savannah Division

In the matter of:	)	
	)	Adversary Proceeding
LISA M. GRIFFIN,	)	
(Chapter 13 Case 98-42738)	)	Number 99-4005
	)	
Debtor	)	
	)	
	)	
ERNEST O. A. JOHNSON	)	
	)	
Plaintiff	)	
	)	
v.	)	
	)	
LISA M. GRIFFIN	)	
	)	
Defendant	)	

FILED
at 11 O'clock & 20 min A M
Date 6/24/99
MICHAEL F. McHUGH, CLERK
United States Bankruptcy Court
Savannah, Georgia

MEMORANDUM AND ORDER

On September 11, 1998, Debtor filed a petition for bankruptcy under Chapter 13. Ernest O. A. Johnson and Shirley K. Johnson, on behalf of Franklyn E. Johnson, a minor, initiated this adversary proceeding on January 20, 1999, seeking a determination that a judgment debt owed by the debtor is not dischargeable under 11 U.S.C. § 523(a)(9). Debtor filed a response asserting that she is not estopped by prior judicial decisions involving the same incident from litigating the requisite elements of nondischargeability. At a pre-trial

hearing in Savannah on March 31, 1999, the parties were directed to brief the issue of collateral estoppel so as to facilitate the presentation of evidence at trial. Based on the brief submitted and on relevant legal authority, I enter the following Order.

FINDINGS OF FACT

On March 6, 1994, Debtor was involved in a collision in which a child was injured. As a result of the collision, Debtor was charged with driving under the influence of alcohol, failure to provide proof of insurance and failure to use due care to avoid pedestrians. In a subsequent hearing in Chatham County Recorder's Court, Debtor pled *nolo contendere* to all three charges and the court accepted her plea.

On July 18, 1994, the parents of the injured child brought suit against Debtor, alleging gross negligence on the part of the Debtor as the cause of the minor's injuries. Debtor failed to file an answer in response to the parents' complaint and judgment by default was entered against Debtor on March 14, 1996. A subsequent court order based on the default judgment awarded the plaintiff parents on behalf of their minor child $50,687.22 in actual damages and $50,000 in punitive damages.

Relying on the testimony of the officer at the scene of the accident, Debtor

argues that the accident could have occurred even if she had consumed no alcohol. Furthermore, Debtor contends that Plaintiffs' civil complaint failed to allege that Debtor was driving under the influence or that Plaintiffs' minor child's injuries were proximately caused by Debtor allegedly driving under the influence of alcohol.

Based on this evidence, Debtor contends that the Plaintiffs failed to establish that the collision arose from her driving under the influence and that as a result, Defendant should be allowed to litigate the nature of the default obligation. Plaintiffs argue conversely that the judgment in default against the Debtor operates as an admission by Debtor of the truth of the definite and certain allegations in the complaint and the fair inferences and conclusions of fact to be drawn from the allegations of the complaint. Summerour v. Medlin, 48 Ga. App. 403 (1934); O.C.G.A. § 9-11-55.

CONCLUSIONS OF LAW

11 U.S.C. § 523(a)(9) provides:

> (a) A discharge under 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt -
>
> (9) for death or personal injury caused by the debtor's operation of a motor vehicle if such operation was unlawful because the debtor was intoxicated from using alcohol, a drug or another

substance.

Under Section 523 (a)(9), a creditor must prove (1) that the debtor was legally intoxicated according to state law and (2) that the debtor's operation of the motor vehicle caused the victim's death or personal injury in order to except a debt from discharge. In re Phalen, 145 B.R. 551, 554 (Bankr. N.D. Ohio 1992). In the present case, this Court is asked to determine whether prior judgments against the Debtor collaterally estop her from relitigating the elements of 11 U.S.C. § 523(a)(9).[1]

In previous decisions, this Court has ruled that collateral estoppel or issue preclusion does apply to § 523(a) dischargeability actions. *See* Walker v. Leggett (In re Walker) (Bankr. S.D.Ga. 1997); *see also* Grogan v. Garner 498 U.S. 279, 284 n.11, 111 S.Ct. 654, 658 n.11, 112 L.Ed.2d 755 (1991); In re Yanks, 931 F.2d 42, 43 n.1 (11th Cir. 1991). Moreover, federal courts must give the same preclusive effect to prior judgments of state courts as those judgments have by "law or usage" in the courts of that state. 28 U.S.C. § 1738 (1994); *See also* In re St. Laurent, 991 F.2d 672, 675-76 (11th Cir. 1993). Therefore,

[1] Plaintiffs alleged in their complaint that the debt is further excepted from discharge under 11 U.S.C. § 523(a)(6). Since a discharge in Chapter 13 would also discharge debts for willful and malicious injuries, the Court finds it unnecessary to address this contention. *See* 11 U.S.C. § 1328.

this Court must apply the law of the state of Georgia in order to determine the preclusive effect of the state court judgments against the Debtor. Id. at 675. While collateral estoppel may foreclose relitigation of issues decided in prior judicial proceedings, the ultimate issue of dischargeability is a legal question over which the bankruptcy court has exclusive jurisdiction. In re Halpern, 810 F.2d 1061 (11th Cir. 1987).

Two Georgia statutes recognize the conclusive effect of judgments by providing as follows:

> A judgment of a court of competent jurisdiction shall be conclusive between the same parties and their privies as to all matters put in issue or which under the rules of law might have been put in issue in the cause wherein the judgment was rendered until the judgment or set aside. O.C.G.A. § 9-12-40.
>
> Where the merits were not and could not have been in question, a former recovery on purely technical grounds shall not be a bar to a subsequent action brought so as to avoid the objection fatal to the first. For a former judgment to be a bar to subsequent action, the merits of the case must have been adjudicated. O.C.G.A. § 9-12-42.

Collateral Estoppel Based on the Default Judgment

A judgment of default is a "judgment on the merits" for purposes of § 9-12-42. Butler v. Home Furnishing Co., 163 Ga. App. 825, 296 S.E.2d 121 (1982); Fierer v. Ashe, 147 Ga. App. 446 (1978); however, satisfaction of § 9-12-42 is not conclusive. Under

Georgia law, a party may only assert the doctrine of collateral estoppel if the issue was (1) raised in the prior proceeding, (2) actually and fully litigated, (3) decided by a court of competent jurisdiction, and (4) necessary to final judgment. *See* Kent v. Kent, 265 Ga. 211, 452 S.E.2d 764 (1995) (*citing* Boozer v. Higdon, 252 Ga. 276, 278, 313 S.E.2d 100, 102 (1984)); Restatement of Judgments, Second § 27 (1982)). In addition, collateral estoppel requires that the parties or their privies be identical in both actions. Wickliffe v. Wickliffe Co. 227 Ga. App. 432, 433, 489 S.E.2d 153, 155 (1997), *cert. denied*, Jan. 5, 1998.

In the instant case, the default judgment issued by the state court established the Debtor's liability for the victim's injuries as a result of the Debtor's negligent operation of a motor vehicle. The issue as to the defendant's liability was raised in the prior civil litigation, actually and fully litigated, decided by the court and necessary to the court's final judgment which assigned liability for the accident to the defendant. In addition, the parties in both the civil litigation and adversary proceedings are also identical. All requirements as to collateral estoppel under Georgia law are satisfied and the issue as to whether the Debtor's liability resulted from the operation of her motor vehicle is resolved accordingly by the default judgment. As a result, the requirement of Section 523(a)(9) that the liability in question stem from Debtor's operation of a motor vehicle is established. Debtor is therefore collaterally estopped from relitigating the issue as to whether or not her operation of a motor

vehicle caused the injuries to Franklyn Johnson and created the resultant liability.

Collateral Estoppel Based on the Plea of *Nolo Contendere*

Georgia courts have generally held that a plea of *nolo contendere* stands on the same footing as a guilty plea except that it cannot be used against the defendant in any other court as an admission of guilt. Wright v. State, 75 Ga. App. 764, 44 S.E.2d 569 (1947). A defendant convicted under such a plea is held to have been 'adjudged guilty and convicted.' Nelson v. State, 87 Ga. App. 644, 648, 75 S.E.2d 39, 43 (1953). Some courts allow a criminal conviction on a plea of *nolo contendere*, in a case involving moral turpitude, to be used as impeaching evidence in a subsequent civil case. Tilley v. Page, 181 Ga. App. 98, 100, 351 S.E.2d 464 (1986). Despite this limited use, neither a party's plea of *nolo contendere* nor a conviction based upon such a plea shall be used as a conclusive admission of guilt sufficient to impinge the party's rights under the law. Nelson v. State, 87 Ga. App. 644, 648-649, 75 S.E 2d 39, 43 (1953); Windsor Forest, Inc. v. Rocker, 121 Ga. App.773, 774-775, 175 S.E.2d 65 (1970).

In the present case, Debtor pled *nolo contendere* to the criminal charges of driving under the influence, failure to provide proof of insurance and failure to use due care to avoid pedestrians. The state court's subsequent acceptance of such pleas constitutes a

conviction on each of the three counts individually. Georgia law, however, does not allow the defendants' to invoke collateral estoppel as to the issue of the Debtor's driving under the influence because of the underlying *nolo contendere* plea. Wright, 75 Ga. App. at 764. Additionally, collateral estoppel is not applicable because the Plaintiffs were not parties in the criminal trial of the Debtor. Wickliffe, 227 Ga. App. at 433.

CONCLUSION

I conclude, therefore, that Debtor is precluded from relitigating the issue as to whether the liability in question arose as a result of her operation of a motor vehicle. Debtor is not, however, estopped from litigating the issue as to whether she was intoxicated at the time of the accident. Plaintiff will have the burden of establishing that Debtor was intoxicated at the time of the accident, but will not be required to show that intoxication caused the accident.

ORDER

Pursuant to the foregoing Findings of Fact and Conclusions of Law IT IS THE ORDER OF THIS COURT that Debtor is collaterally estopped from disputing that her operation of a motor vehicle caused the injuries to Franklyn Johnson or the amount of damages. IT IS FURTHER THE ORDER OF THIS COURT that Debtor is not estopped

from litigating the issue of her operation of a vehicle while under the influence of alcohol.

The clerk is directed to set this matter for trial in accordance with this Order.

Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This 23rd day of June, 1999.